No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1942

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court (R. 20a–21a) is not yet reported. The opinion of the circuit court of appeals (R. 26–31) is reported at 130 F. (2d) 93.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 29, 1942 (R. 32). The petition for a writ of certiorari was filed on October 24, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

QUESTIONS PRESENTED

1. Whether the state law must be applied to determine the right of the United States to recover payment made to guarantors of the forged endorsement of the payee of a Government check.

2. Whether, if federal decisions are invoked, the rule announced in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, was properly applied.

STATUTES INVOLVED

No statutes are directly involved in this case.

STATEMENT

This action was brought by the United States against the J. C. Penney Company and the Clearfield Trust Company to recover the amount of a check ($24.20) drawn by it and endorsed successively by the defendants after a prior forged endorsement of the payee's name. The check, dated April 28, 1936, was drawn upon the Treasurer of the United States and was payable, through the Federal Reserve Bank of Philadelphia, to the order of Clair A. Barner. (R. 13a–14a.) Although it had been mailed to the payee on or about that date as payment for WPA services rendered he never received it (R. 14a). In some unknown manner the check was obtained by an unknown person who negotiated it for value to the Penney store in Clearfield, Pennsylvania, after having identified himself to the Penney

Company's employees there as Clair A. Barner, and after having endorsed the check in Barner's name (R. 14a). The Penney Company accepted the check and endorsed it over to the Clearfield Trust Company for collection (R. 14a). The latter, after endorsing the check with a guaranty of prior endorsements, collected it from the United States through the Federal Reserve Bank of Philadelphia (R. 15a).

On or before May 10, 1936, Barner advised the timekeeper and the foreman of the WPA project on which he was employed that he had not received the check in question and they subsequently conveyed this information to other agents of the United States (R. 15a). On November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name was a forgery (R. 15a). On January 12, 1937, the United States notified the Clearfield Trust Company of the forgery of Barner's endorsement and on August 31, 1937, requested reimbursement (R. 15a). The Trust Company in turn requested the Penney Company to reimburse it in the amount of the check, but the latter refused, insisting that the United States' delay in notifying the endorsers of the forgery freed them of the necessity for repayment (R. 16a). Although diligent inquiries have been made the forger has remained unidentified and unapprehended (R. 16a–17a).

The Penney store in Clearfield cashes many hundreds of checks each year for purchasers or

probable purchasers of its merchandise. If a check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed the Company's employees can often locate the person who cashed the check through the one who vouched for him or by inquiring of the clerk who accepted the check and having him proceed immediately to locate the customer who presented it. But at the time the Clearfield Trust Company and the Penney Company were notified of the alleged forgery none of the latter's employees were able to remember anything about the transaction or the check in question. (R. 16a.)

The district court held that the case was to be governed by Pennsylvania law (citing *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 346) and that under that law the United States could not recover "because of the unreasonable delay on its part in giving notice of the forgery to the defendant" (R. 20a–21a). The circuit court of appeals reversed, holding that "the matter is to be decided as a federal question" rather than in accordance with local law (R. 30). And as a federal matter, *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which held that the right of the United States to recover was not conditioned either on the demand or the giving of notice, controlled this case. The court also found as a fact that the delay of the United States in giving notice did not prejudice the petitioners.

ARGUMENT

We believe that the first issue, while correctly decided below, is of sufficient general importance to justify a definitive answer by this Court, and accordingly do not oppose the grant of a writ of certiorari with respect thereto. As to the second question, however, we believe that the decision below is clearly correct and that a review on this point is unmerited.

1. The court below held that the rule of uniformity declared by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, did not apply to the present case. Since the United States was in court not through diversity of citizenship but under its express right to sue, since the check was issued for services performed under an Act of Congress, and since the forgery was a federal offense the court concluded (130 F. (2d) 93, 94), that the issues originated from the Federal Constitution and statutes as directly as did those involved in such post-*Tompkins* decisions as *Board of County Commissioners* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; and *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.*, 315 U. S. 447. Hence, it refused to apply the state decision which would bar recovery solely because of the Government's undue delay in notifying petitioners of the forgery, and instead relied upon the contrary rule established by this Court in *United*

States v. *National Exchange Bank of Providence*, *supra*.

Petitioners urge that *Erie R. Co.* v. *Tompkins*, *supra*, and *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, require invocation of the state case law. We believe the court below correctly decided that question, but in view of its importance do not oppose its review by this Court. Apparent conflict exists between the decision below and that of the circuit court of appeals for the Ninth Circuit, in *Security-First Nat. Bank* v. *United States*, 103 F. (2d) 188.[1] The court there applied state law to determine the Government's right to recover payment of a check upon which the payee's endorsement had been forged by an impostor.[2] On the assumption made by the court below that the problem is the same where contracts other than negotiable instruments are involved, further conflict may be found. *United States* v. *Brookridge Farm, Inc.*, 111 F. (2d) 461

[1] It should be noted that that case was decided before any of the post-*Tompkins* decisions relied upon by the court below were cited by this Court. However, a district court has subsequently, without discussion, applied state decisions to a situation even closer to the facts at hand. *United States* v. *Citizens Union Nat. Bank*, 40 F. Supp. 609 (W. D. Ky.). But cf. *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.); *United States* v. *National City Bank of New York*, 28 F. Supp. 144 (S. D. N. Y.).

[2] In that case, the check had been delivered by the Government to the impostor, a fact not here present.

(C. C. A. 10); cf. *Alameda County* v. *United States*, 124 F. (2d) 611 (C. C. A. 9).[3]

If the state law is held not to be controlling under the rule in the *Tompkins* case, the further question is presented whether, as petitioner suggests, the local rule should be applied as a matter of policy (cf. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289).

2. Petitioners also ask modification of the decision in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, to conform to the interpretation placed thereon by decisions of the lower federal courts. This Court there held that the right of the United States to recover payment made to the guarantor of a forged endorsement arises upon payment, and is not conditioned upon either demand or the giving of prompt notice after discovery of the forgery. Several lower federal courts have held, however, that the case permits denial of recovery where the Government's undue delay in giving notice after discovery of the forgery has caused actual damage to defendant. *Ladd & Tilton Bank* v. *United*

[3] Several district courts have held in cases not involving a negotiable instrument, that state law is not binding in determining the contractual rights and liabilities of the Government. *Byron Jackson Co.* v. *United States*, 35 F. Supp. 665 (S. D. Calif.); *United States* v. *Grogan*, 39 F. Supp. 819 (D. Mont.); *Kolker* v. *United States*, 40 F. Supp. 972 (D. Md.).

States, 30 F. (2d) 334 (C. C. A. 9); *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.); *United States* v. *National City Bank of New York*, 28 F. Supp. 144 (S. D. N. Y.). The court below, without indicating whether the *Providence* case justified such a doctrine, concluded that petitioners did not come within its scope since the facts did not establish loss resulting from the Government's delay in giving notice of the forgery. The instant case hence raises no questions with respect to the extension of the *Providence* decision by the lower federal courts. On the facts found, the application of that decision was clearly correct, and by the weight of authority, unreasonable delay without resulting prejudice is no defense to the action here involved. See Daniel, *Negotiable Instruments* (7th ed.), Vol. 3, § 1623, p. 1669; Brannan, *Negotiable Instruments Law, Ann.* (4th ed.), p. 192; 10 C. J. S. (1938), p. 1017, § 467.

CONCLUSION

Accordingly, it is respectfully submitted that the writ of certiorari, if granted, should be limited to a review of the first question raised by the petition.

CHARLES FAHY,
Solicitor General.

NOVEMBER 1942.

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